FORUM

Financial Contributions as a Market Mechanism and the Resource Management Act 1991

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This paper will consider whether financial contributions are becoming a supplementary form of taxation or revenue gathering for local authorities. Are they a ticket for the right to develop, or an appropriate tool requiring the off-setting of adverse effects? It is proposed to briefly review the concept of financial contributions as it arises overseas. The relevant provisions of the Resource Management Act 1991 ("the RMA") and several district plans will be examined to illustrate the increasing and varied use of financial contributions as a significant market mechanism in environmental law.

Introduction

At first glance the issue of financial contributions is a simple one. Financial contributions are a form of economic instrument designed to achieve an environmental objective. Those who create adverse effects on the environment should offset those effects by ensuring the creation of positive effects. The concept is one that has long existed. In New Zealand law, the requirement to build roads and set aside land for public open space at the time of subdivision dates back to the nineteenth century. Similarly in the first half of the twentieth century, further

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contributions towards services, such as water supply and sewerage, became standard requirements in urban areas.[1]

The last twenty years have seen an increase in the external costs associated with private land development being borne by developers rather than by local bodies. This increase, seen not only in New Zealand, but also in Britain, the United States, and Australia, is in line with changing attitudes towards the respective responsibilities of the public and private sectors, and acceptance of the fact that developers should bear their own costs.

There are a considerable number of mechanisms that fall under the broad framework of "financial contributions". In New Zealand a local authority generally imposes a condition requiring financial contributions when granting a resource consent. In other countries, particularly Britain, developers enter into contracts, commonly called "planning agreements", with local authorities in exchange for the grant of planning permission.

The RMA establishes a framework by which a territorial authority, through incorporation of provisions from the RMA into its regional or district plan, can require a developer to make financial contributions. Those contributions are then contained in a condition attached to a resource consent, and may involve the provision of money or land.

An International Perspective on Financial Contributions

Position in the United States

American literature on financial contributions is littered with phrases that are generally unfamiliar to New Zealanders. While the concept of financial contributions is generally referred to as "takings" or "planning gain", there are many other terms. An "exaction" or "linkage fee", for example, is the requirement that a developer provide some extra socially oriented facility, either on or off site, for example, a crèche or a new town hall. A "dedication" involves a voluntary contribution of land to a local authority, and an "impact fee" sees a developer charged according to a calculation based on the type, scale or location of the proposed development. This fee is then applied to mitigate its impact on the community.

The question of financial contributions in the United States has always been closely intertwined with the Fifth Amendment, which prohibits the taking of property by the State, except for a public purpose upon payment of just compensation. This constitutional dimension has led to a conservative approach

1 Ministry for the Environment, *Resource Management Ideas No 9: Developing Financial Contributions Policy under the RMA* (April 1994).

to the imposition of financial contributions. Commentators[2] report on the development of three different tests in varying States.

(a) The narrowest interpretation requires a contribution to be "specifically and uniquely attributable" to the proposed development in order for it to be found to be reasonable.
(b) The most liberal test, which has been adopted by Californian Courts, is known as the "reasonable relationship test". Under this test the court requires that a reasonable relationship exist between any conditions imposed on a developer and the public needs generated by the new development.
(c) The "rational nexus" (also referred to as the essential nexus) test, which has been accepted by the Supreme Court in *Nollan v California Coastal Commission*,[3] falls somewhere between the other two. The essential principle behind the test is that the authority imposing the fee should be able to show that the development will cause a need for new public facilities and that the contribution required is proportionate to that need and will actually be used to provide the needed facilities.

In the *Nollan* case, consent was granted to rebuild a house on the waterfront. The proposed house would impede visual access to the beach. The condition required that Nollan dedicate an easement for public passage between the house and the sea. The Supreme Court held that for the condition to be constitutional it had to solve the damaged public interest alleged to be caused by the development. It found that if the object was to protect the views of the beach, then conditions should have been imposed limiting the design of the house or requiring a public viewing point. It can be seen that the "rational nexus" test requires that the burden placed on a developer must relate directly to the problem caused by the developer.

In *Dolan v City of Tigard*[4] the US Supreme Court again considered the rights of an individual property owner over claims by local government. The City required Mrs Dolan to provide an easement along the edge of her property for a pedestrian path before it would allow her to expand her store. The Court found that the requirement met the "essential nexus" test of *Nollan* but decided in the plaintiff's favour because the contribution she was required to make failed a second test of "rough proportionality" with the impacts of the development being regulated. In commenting on the case, Leigh Raymond stated:[5]

2 Callies, D. & Grant, M., "Paying for Growth and Planning Gain: An Anglo-Americas Comparison of Development Conditions, Impact Fees and Development Agreements" (1991) 23(2) *The Urban Lawyer* 221.

3 (1987) 483 U.S. 825, 837; 97 L. Ed 2d 677, 689.

4 (1994) 512 U.S. 374; 129 L. Ed 2d 304.

5 Raymond, L., "The Ethics of Compensation: Takings, Utility and Justice" (1996) 23(3) *Ecology Law Quarterly* 577, 615.

> Just as it would be inappropriate to exact a concession from a land owner that was unrelated to the problems posed by their actions, so too would it be unjust to exact remedies that are disproportionate to the problems created. The individual should pay for her share of the additional costs created by her actions and no more.

Position in the United Kingdom

While the mechanism of financial contribution is used in the United Kingdom, it is the issue of planning agreements that has received most judicial consideration.

The Planning Compensation Act 1991 (UK) requires decisions to be made in accordance with the development plan, which in New Zealand roughly equates to the district plan, unless there are "material considerations indicating otherwise". This has led to situations where, increasingly, local bodies attempt to reduce the financial burdens they face by requiring those seeking development approval to carry out substantial works in or about the location of the development. Frequently, those works do not arise as a direct result of the development.

In the case of *R v Plymouth City Council*[6] the Court of Appeal considered competing development proposals for a large food store. The proposal submitted by Sainsbury contemplated the construction of a tourist information centre, a bird-watching hideout overlooking the River Plym, a static art feature, and an off-site park-and-ride facility. Tesco's proposal, meanwhile, included a financial commitment to provide a crèche, a wildlife habitat on a site contiguous to the proposed development, a moving water sculpture on site, and the sale to the Council of a site for park-and-ride facilities. An unsuccessful third supermarket applicant applied to quash the permissions granted for the stores, arguing that only community benefits necessary to overcome or remedy planning objections could be taken into account as "material considerations". In dismissing the appeal the Court of Appeal held that each and every one of the obligations volunteered by Sainsbury and Tesco, whether on site or off site, was capable of being regarded as having a planning purpose and being related to permitted development, in accordance with the test developed in *Newbury District Council v Secretary of State for the Environment*.[7]

This broad interpretation of the phrase "material considerations" and the unwillingness of British courts, unlike the United States courts, to judicially examine the merits of planning decisions in accordance with the *Wednesbury*[8] principle have seen a broader interpretation of the financial contributions that can be required as part of a development. While we can wonder at the breadth of varying contributions required, it must be remembered that in many instances

6 (1993) 67 P&CR 78 (CA).

7 (1980) 1 All ER 731.

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680.

companies are voluntarily entering into the agreements with a council. The extra development costs and services that are offered can, of course, be built into the proposal at ground level. If they all lead to a council granting consent then they may be seen as an acceptable "extra" by the marketplace. It may, however, become difficult to see how these proposals can be regarded as anything other than the buying of consent by an applicant.

In *Tesco Stores Limited v Secretary of State for the Environment*[9] an applicant supermarket offered to build a new link road around the centre of town to reduce traffic congestion. The cost was to be a staggering £6.6 million. Despite this more than generous offer, the local body granted consent to another supermarket chain. Tesco was, not surprisingly, somewhat put out that their generous offer did not result in planning approval. The House of Lords, while confirming that the roading offer was a "material consideration" to which regard should be had, found that the weight to be given to it was a matter for the Secretary, who had, on the facts, accorded full and proper consideration to the roading offer. The House of Lords refused to invalidate the decision.

It is heartening to see that local bodies will consider competing applications and reach decisions that do not necessarily result in the greatest material benefit to the council. It could be said that Tesco's attempt to buy planning consent had been unsuccessful. The House of Lords made some firm statements with regard to financial contributions. Lord Keith stated:[10]

> An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission.

Lord Hoffman stated:[11]

> The practice caused a good deal of public concern. Developers complained that they were being held to ransom. They said that some local authorities insisted that in return for planning permission an applicant should make a payment for purposes which could in no way be described as external costs of the particular development ... some authorities appeared to regard themselves as entitled to a share in the profits of development, thereby imposing an informal land development tax without the authority of Parliament. Citizens, on the other hand, complained that permissions were being granted for inappropriate developments simply because the developers were willing to contribute to some pet scheme of the local planning authority.

9 [1995] 2 All ER 636, 642 Keith L (HL).

10 Ibid, 647.

11 Ibid, 651.

The House of Lords has, therefore, endorsed a requirement that there must be a connection with the proposed development which is not "de minimis". This can be referred to as the "necessity test" and rejects unrelated offers that are in effect an attempt to buy planning permission. While the test differs little from the American "rational nexus" test as far as the words are concerned, it appears to be more liberally interpreted in practice. The "necessity" for a moving water sculpture or a tourist information centre seems to stretch the boundaries.

Australia

The power to impose financial contribution conditions in Australia is founded on the statutory authority contained in relevant planning legislation, which varies from state to state, and the presence of a development contributions section in local body planning schemes.

The Victorian approach is seen in *Eddie Barron Construction Pty Ltd v Shire of Pakenham.*[12] In that case, the Administrative Appeals Tribunal in Victoria found that, in order to be valid, a financial contribution condition must meet the following criteria:

(a) There must be a need for the facility created by the development;
(b) The money collected must not be used for any other purpose; and
(c) There must be a *reasonable nexus* between the facility and the development.

The Tribunal stated that "money payments which do not meet these criteria may in fact be taxes and may therefore be invalid".[13]

In New South Wales, councils are required, by the Environment Planning and Assessment (Contributions Plans) Amendment Act 1991, to establish contribution plans. These public documents outline:[14]

(a) The predicted increase in local demand as a result of the development and the associated increase in demand for public services and amenities;
(b) A formula for fixing the contribution amount;
(c) Current contribution rates; and
(d) A works schedule setting out the timing and location of how the contributions are to be used.

In commenting on these Contribution Plans, C. P. Bond[15] referred to the fact that there must be a link established between the development and the need for public

12 (1991) 6 AATR 8.
13 Ibid, 23.
14 New South Wales Department of Planning (NSWDP), *Section 94 Contributions Plan Manual* (1992).
15 Bond, C. P., *Financial Contributions on Subdivision and Development under the Resource Management Act 1991*, Research Study (B Plan), University of Auckland (1994).

services. The nexus required must be fundamental to the imposition of contributions and is, in essence, that of need. These examples from Victoria and New South Wales illustrate that there are well-defined parameters in Australia for the establishment of financial contribution conditions.

The Resource Management Act 1991

The statutory framework in the RMA that authorises the imposition of financial contributions is contained in s 108 (as amended by s 24(1) of the RMA 1991), Part I clause 5, and Part II clause 3 of the Second Schedule. For any financial contribution provisions to be intra vires they must satisfy not only those parts of the RMA, but also s 31 (functions of territorial authorities), s 72 (purpose of district plans), s 75 (contents of plans) and Part II of the RMA. The s 32 duty must also be discharged by the territorial authority in the preparation of plan provisions. Section 108 has three essential elements that must be complied with:

(a) The contribution can take the form of money, or land, or any combination of them (s108 (9)(a)(b) and (c)).
(b) The purposes of the contribution must be imposed in accordance with the purposes specified in the plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect) (s108(10)(a)).
(c) The level of the contribution must be determined in the manner described in the plan (s108(10)(b)).

It is important to remember that rules relating to financial contributions can only be imposed pursuant to the procedure in the First Schedule of the RMA. There is the right to lodge submissions and cross submissions, to appear at the hearings, and to file references in the Environment Court. Developers must remain vigilant and consider proposed plans as soon as they are notified. They have opportunities to air their views and influence outcomes on the imposition of financial contributions and the appropriate formula and maximum amounts. The divergence in interpretation given to financial contributions by differing territorial authorities will be considered later in this paper.

The RMA is frequently described as an effects-based planning regime. Plans, which have the role of implementing the purposes and principles of the RMA, must focus on regulating activities based on the effects of those activities. The question whether a developer is required by the RMA to compensate for all the effects of its development is at the heart of the diverging viewpoints growing between developers and local bodies.

Developers argue that the RMA is not about the avoidance of all adverse effects, nor is it anti-development. The "sustainable management" purpose set

out in s 5 has been interpreted by the Planning Tribunal and Environment Court[16] as requiring a "broad judgment" as to whether a proposal would promote the sustainable management of natural and physical resources. This "broad judgment" allows "for a comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome".[17] Developers, therefore, hold the view that they should not be required to provide financial contributions to avoid, remedy or mitigate *all* the adverse effects of their development. They also argue that the beneficial effects of their development should be taken into account in fixing financial contributions.

Prior to the commencement of the RMA, financial contributions were governed by the Local Government Act 1974 ("the LGA"). The statutory provisions were complex and very specific. A developer of a residential subdivision could be required to make a reserves contribution, by way of land, money, or both, of up to 7.5 per cent of the value of residential allotments. Those carrying out developments for industrial or commercial purposes could be required to make reserves contributions of up to 10 per cent of the value of each allotment. Substantial developments for administrative, commercial or industrial purposes could be required to pay a development levy of up to 0.5 per cent of the value of the development. In considering the development contribution sections of the LGA, the Planning Tribunal has held that the purpose of reserves and other contributions was to ensure that there was an adequate level of public facility to support the increased level of activity that would follow on from a development. The decision whether a contribution was required was found to be closely linked to any resulting increased level of activity.[18]

Although there has been significant debate as to what the RMA requires from councils imposing financial contribution provisions, to date there is only limited case law. Much of it relates to consent conditions generally and not specifically to financial contribution provisions in resource management plans. Although much of the case law is under the Town and Country Planning Act 1977 ("TCPA") and LGA, it is applicable to the RMA environment. The case law establishes a number of important principles. Financial contribution provisions imposed by a council must:

(a) Meet the tests established in *Newbury*:[19]
   (i) They must be for a resource management purpose and not an ulterior one. They must not impose a direct revenue charge to be used for non-related purposes or purposes only indirectly relevant to the purpose of

16 *North Shore City Council v Auckland Regional Council* [1997] NZRMA, 59.
17 Ibid, 94.
18 *New Zealand Steel Ltd v Auckland Regional Council* Planning Tribunal, C37/89, 22 May 1989.
19 Supra note 7.

the RMA (*Candy v Coromandel County Council*).[20] In *Bletchley Developments Limited v Palmerston North City Council (No.1)*[21] the Planning Tribunal found that a requirement that the width of a road and carriageway be increased to service future development beyond a subdivision did not have a sufficient relationship with the subdivision to which resource consent was granted. As the requirement was not authorised by section 108(2) of the RMA, it was unauthorised.

(ii) They must fairly and reasonably relate to the activity that is the subject of the consent. In New Zealand this has been broadened into the requirement that the condition must be fair and reasonable. In *Woodridge Estates Ltd v Wellington City Council*[22] the Council's attempt to claim a maximum cash contribution on every cross lease within a subdivision was found to be "grossly inequitable and unfair".

(iii) They must not be so unreasonable that no planning authority could have approved them. In *An Application by Hamilton City Council*[23] the Court considered a declaration application sought by the Council regarding its powers to require reserve fund contributions in respect of cross-lease subdivisions. The Planning Tribunal stated:

> There needs to be an application of judgment to the circumstances of each case, and an underlying presumption that the amount calculated according to whatever formula is applicable may need to be moderated by reference to what is fair and reasonable in those circumstances.

(b) They must relate directly to the activity's environmental effects. The contribution must be designed to avoid, remedy, or mitigate the activity's adverse effect on the environment, and/or contribute to a positive effect which helps to offset an adverse effect (*Nugent Consultants v Auckland City Council*[24]). Developers will want to ensure that financial contributions are only considered when it can be shown that an activity actually has an adverse effect.

(c) They must contain a clear statement as to how and when they would be considered and how they will be assessed and applied (*Tainui Investments Limited v Waimea County Council*,[25] *Transit New Zealand v Hawkes Bay Regional Council*[26]).

20 (1975) 5 NZTPA 192.
21 [1995] NZRMA 337.
22 (1993) 2 NZRMA 656, 660, Treadwell J.
23 (1993) 2 NZRMA 428.
24 [1996] NZRMA, 481.
25 (1980) 8 NZTPA 65, 68.
26 Planning Tribunal, W116/94, 15 December 1994.

(d) They must not incorporate a reference to a standard or procedure unless that standard is:
- definite; and
- not subject to change to an extent constituting an unauthorised delegation of a function or power (*Tainui Investments Ltd v Waimea County Council*[27]).

(e) They must not contain an undue measure of discretion (*Wood v Selwyn District Council*[28]).

(f) The level of the contribution must be determined in the manner described in the Plan. Prior to the 1997 Amendment, the RMA required the maximum amount of the contributions (or the method by which it could be calculated) to be specified. The amendment recognises the very broad interpretation given to "specify the maximum amount" in *Nicoll Management Limited v The Manukau City Council.*[29]

At first glance it may seem difficult to relate these legal principles to either the "necessity" test or the "rational nexus" test which arise overseas. In its document entitled *Resource Management Ideas No 9: Developing Financial Contribution under the Resource Management Act* (April 1994), the Ministry for the Environment ("MFE") suggests the establishment of a Justifiable Proportion Test. A financial contribution must be justifiable in that it must:

> Directly relate to avoiding, remedying or mitigating adverse effects on the environment ... and its proportion must be appropriate in that it should take into account the:
> - Significance of any adverse effect;
> - Extent to which the activity causes the effect; and
> - Positive effects of the activity on the environment.

The Planning Tribunal in the *Bletchley Development* case establishes a similar principle. It found that there must be a "sufficient relationship" between the subdivision, consent and the condition.[30]

The Development of District Plans under the Resource Management Act

A substantial number of district plans have now been through the notification, submission, and hearing process. There have been considerable differences in the approach taken by territorial authorities to financial contributions. There have been numerous submissions that the contribution rules in proposed plans do not meet a number of the legal tests set out earlier in this paper. The lack of legislative

27 See supra note 25.
28 (1994) 3 NZPTD 451.
29 Planning Tribunal, A62/94, 28 July 1994, Judge Sheppard.
30 Supra note 21, at 347.

certainty and the vast differences between district plans indicates that there is an urgent need for judicial clarification of financial contribution issues. Territorial authorities set their objectives, policies, and methods regarding financial contributions, and establish the extent to which they will use them as a mechanism to collect funds in district or regional plans. It is at this point that those opposed to the increased use of financial contributions as a revenue-gathering medium need to be vigilant. Mechanisms exist in the RMA for plans to be challenged, and they should be used.

A study of selected plans sees a huge variation in the approach to financial contributions. Developers with projects in different parts of the country could find themselves facing varying maximum contributions and/or formulae, as well as a range of approaches to the requirement that developers offset all, most, or some adverse effects. For example, the Otago Regional Coastal Plan states in the introduction to s 19 on Financial Contributions that:

> The Otago Regional Council does not intend that environmental effects should be "fully mitigated" or fully compensated in every case. The "maximum amounts" indicated in this chapter are intended as an upper limit.

At the other end of the scale, the Hawke's Bay Regional Water Resources Plan initially set a maximum contribution of 10 per cent of "the agreed value of development". A reference filed with the Environment Court led to the financial contribution section of the plan being deleted.

The Wellington City District Plan included a requirement that appeared to adopt an assumption that developers must compensate for all the effects of their development activities. The second paragraph of the introduction to financial contribution provisions of the plan stated:

> In the context of new development the district plan uses financial contributions to build into the cost of the *development any physical, environmental or social costs that can be identified.* It does this by ensuring that the developer avoids, remedies, mitigates or compensates for *any* adverse effects. [Emphasis added.]

The explanation to the financial contributions section in the plan stated:

> It is Council policy that the *full costs of all developments* are faced by the applicant, including impacts on traffic flows, reserves, drainage, sewage and the natural environment ... [Emphasis added.]

As with many other plans throughout the country, financial contributions were required on permitted activities. There has been much debate[31] amongst

31 See, eg, Milligan, J. R., "Financial Contributions: A Vanished Power?" (March 1996) *Planning Quarterly*; Atkins, H., "Financial Contributions" (December 1996) *Planning Quarterly* 2; and Kirkpatrick, D., "Financial Contributions and Permitted Activities" (March 1997) *Planning Quarterly* 2.

commentators as to whether this is appropriate. Following the hearing of submissions the plan was amended considerably. While the requirement for financial contributions on permitted activities remained, the "maximum" amount was deleted and a set of guidelines and criteria were established to calculate the amount reasonably required to compensate for loss of amenity values.

The Auckland City Central Area Plan was notified in 1998 and attracted a large number of submissions on its financial contributions section. The Plan calls for a 5 per cent contribution on all development to provide capital works relating to public spaces, and a further 5 per cent to remedy or mitigate adverse effects on the transport system. The s 32 analysis of the Plan refers to the possibility of introducing a variation to the Plan to also charge for the effects of development on the city's drainage infrastructure in the near future. Unlike the City of Auckland — Proposed District Plan Isthmus Section 1993, which uses financial contributions to manage "identified adverse effects", the Central Area Plan is directed at avoiding, remedying or mitigating the "significant adverse effects" of development on the environment. The use of the word "avoiding" and the deletion of the requirement that effects be identified indicates that the Auckland City Council proposes a different approach to financial contribution in each of its two Plans. The Central Area Plan does not require contributions to be tied to specific effects. It will be interesting to observe changes that may come about as a result of the submissions procedure.

Conclusions

It is accepted that the imposition of financial contributions on developers may be appropriate in some circumstances. It must be remembered, however, that these increased costs faced by developers are not borne by them in the long term. They are built into financial costing and are ultimately paid for by those who use the developments.

It is also accepted that territorial authorities need funds with which to provide infrastructure, open spaces, and socially acceptable living conditions. While legislation exists to enable the collection of those funds, by way of rates or loans, the residents' increasing resistance to paying has led a swing towards using financial contributions to meet costs. In addition, financial contributions required under plans are not necessarily the only ones a developer may be required to meet. There is an increasing trend for neighbours, who perceive themselves as being on the receiving end of an adverse effect, to require monetary or other compensation to mitigate that effect. While the RMA is silent on the matter, and territorial authorities turn a blind eye to it, it is an indisputable fact that such agreements are reached. Similarly, the possibility exists for developers to find themselves having to enter into British style "planning agreements" with territorial

authorities as an incentive for the granting of consent. In his review of s 104(1)(a) of the RMA, which requires the taking into account of any positive effect, Palmer states:[32]

> ... there is no prohibition or principle implicit in the RMA which would render unlawful or irrelevant, an offer of a "planning gain" by a developer. ... the changing capacity of central and local government to finance and shoulder the burden of external costs, points to an increasing probability of negotiations by applicants with local authorities to settle the equitable sharing of external costs.

The situation could exist, therefore, where developers would find themselves not only making financial contributions pursuant to a plan, but also entering into a planning agreement with a council and, possibly, a neighbour.

It is clear that there is presently a considerable need for statutory and/or judicial guidance on the matter of financial contributions. Developers are being denied a uniformity of approach by territorial authorities and the certainty they require for budgeting and planning purposes. In the interests of good project planning and financial costing there must be clear and consistent interpretation of the RMA by local bodies. While it is accepted that local bodies have the power to require financial contributions as conditions of resource consents, those conditions, and the rules from which they are calculated, need to be fair, reasonable, and certain.

At the centre of the apparent up-turn in the requirement for developers to pay financial contributions is the territorial authorities' increasing acceptance of the philosophy that developers should be required to make financial contributions to offset all of the adverse effects that arise as a result of the development. There is also an established resistance by territorial authorities in accepting that development, in many cases, has beneficial effects which are often overlooked when calculating financial contributions.

The argument that developers should compensate for all the effects of their activities is fundamentally flawed. It overlooks the fact that growth is a function of many factors in addition to development, most of which are beyond the control of developers. It is the growth of the number of people in any particular area that results in the most direct effects on the resources of that district. However, population growth can only ever be facilitated by land development — not caused by it. It is just as plausible to argue that territorial authorities themselves should contribute, because those bodies zone land for residential development and then grant consents to develop it. The same can be said of the ratepayers who actually live in the district and use its resources.

32 Palmer, K. A., "Development consents and 'planning gain' — Bargain and sale?" (1996) 1 *Butterworths Resource Management Bulletin*, 191, 192.

There is a philosophy amongst local bodies that since developers take the benefit of growth, they should pay for it. This is nonsensical. As with the causes of growth, the benefits of it are enjoyed by everyone in the form of a productive and vibrant district and not just by those involved in land development. Financial contributions should not be used to avoid an equitable distribution of responsibility for the effects of community growth.

There seems to be no doubt that many plans emanating from territorial authorities bear little or no resemblance to the American "rational nexus" test, the English "necessity" test or the Australian "reasonable nexus" test. Similarly, they do not resemble the MFE's suggested test nor the principles that have been established judicially.

A philosophy is being espoused that contributions received will be used simply to "help" councils fund their public works. There appears to be no requirement for the "nexus" or the requirement that the development will cause a need for a new facility. Increasingly, contributions are being required for public space development, roading, or drainage regardless of whether or not there is specific proof of adverse effects being created. Contributions are placed in a fund to generally address issues in the city, rather than to address the specific development. It must be asked where is the "rational nexus" between the requirement to make a public space contribution because of a development on one side of town, and a Council's intention to develop a park on the other. Adverse effects may be being remedied, but not those created by the particular development. While this approach could arguably meet the liberal "reasonable relationship" test arising in America, and referred to earlier in this paper, there is little doubt that it is a far cry from the statements in *Bletchley*[33] or *Newbury*.[34]

The Rodney District Plan Proposed Plan Change Number 62, presently before the Environment Court, relates to financial contributions, and some of the issues raised in this paper may be addressed in the decision.

There appears to be an increasing trend by territorial authorities to fund public works by way of financial contributions, whilst "hiding" behind the philosophy of the RMA and its requirement that adverse effects should be remedied or mitigated. Territorial authorities' focus on requiring financial contributions is often a need for funds, rather than the potential effects of developments. While the extent to which adverse effects should be "paid for" has yet to be judicially resolved, many related issues arise. Some adverse effects are difficult to identify, for example, the impact on Maori spiritual values and the loss of wildlife habitats. While the RMA requires that plans establish a basis upon which it can be decided whether the effects are such that a resource consent should not be granted, one

33 Supra note 21.
34 Supra note 7.

wonders if the situation will arise when, rather than the declining of a resource consent, local bodies will simply require the provision of contributions.

The issue of financial contributions is not a simple one. It is extremely complex. It arises in part from local government wishing to fund development from sources other than rating whilst attempting to comply with the rigours of our new effects-based legislation. There has been a plethora of plans, which approach the matter in differing ways, and the future must be watched with interest.

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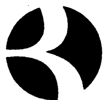

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